INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2000

18 December 2000

List of cases:
No. 6

THE "MONTE CONFURCO" CASE

(SEYCHELLES *v.* FRANCE)

APPLICATION FOR PROMPT RELEASE

JUDGMENT

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JUDGMENT

Present: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, AKL, ANDERSON, VUKAS, WOLFRUM, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS;
Registrar CHITTY.

In the "Monte Confurco" Case

between

Seychelles,

represented by

Mr. Ramón García Gallardo, *Avocat*, Bar of Brussels, Belgium, and Bar of Burgos, Spain,

as Agent;

Mr. Jean-Jacques Morel, *Avocat*, Bar of Saint-Denis, Réunion, France,

as Deputy Agent;

and

Mrs. Dolores Domínguez Pérez, Attorney, Bar of La Coruña, Spain, and Brussels, Belgium, Legal Assistant, S.J. Berwin & Co., London, United Kingdom and Brussels, Belgium,
Mr. Bruno Jean-Etienne, Legal Assistant, S.J. Berwin & Co., London, United Kingdom and Brussels, Belgium,

as Counsel,

and

France,

represented by

Mr. Michel Trinquier, Deputy Director for the Law of the Sea, Fisheries and the Antarctic, Office of Legal Affairs of the Ministry of Foreign Affairs,

as Agent;

and

Mr. Jean-Pierre Quéneudec, Professor of International Law at the University of Paris I, Paris, France,
Mr. Jacques Belot, *Avocat*, Bar of Saint-Denis, Réunion, France,

as Counsel.

THE TRIBUNAL,

composed as above,

after deliberation,

delivers the following Judgment:

Introduction

1. On 20 November 2000, the Registrar of the Tribunal was notified of a letter from the Minister of Agriculture and Marine Resources of Seychelles, transmitted by facsimile, that Mr. Ramón García Gallardo and Mr. Jean-Jacques Morel were authorized to make an application to the Tribunal on behalf of Seychelles under article 292 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"), with respect to the fishing vessel *Monte Confurco*. By the same letter, the Registrar was notified of the appointment of Mr. Ramón García Gallardo as Agent and Mr. Jean-Jacques Morel as Deputy Agent, for the purpose of the application and all proceedings connected therewith.

2. On 27 November 2000, an Application under article 292 of the Convention was filed by facsimile in the Registry of the Tribunal on behalf of Seychelles against France concerning the release of the *Monte Confurco* and its Master. A copy of the Application was sent on the same day by a note verbale of the Registrar to the Minister for Foreign Affairs of France and also in care of the Ambassador of France to Germany.

3. On 27 November 2000, the Agent of Seychelles transmitted to the Tribunal a list of corrections to the initial submission. These corrections, being of a formal nature, were accepted

by leave of the President of the Tribunal in accordance with article 65, paragraph 4, of the Rules of the Tribunal (hereinafter "the Rules").

4. In accordance with article 112, paragraph 3, of the Rules, the President, by Order dated 27 November 2000, fixed 7 and 8 December 2000 as the dates for the hearing with respect to the Application. Notice of the Order was communicated forthwith to the parties.

5. By note verbale from the Registrar dated 27 November 2000, the Minister for Foreign Affairs of France was informed that the Statement in Response of France, in accordance with article 111, paragraph 4, of the Rules, could be filed in the Registry not later than 24 hours before the hearing.

6. The Application was entered in the List of cases as Case No. 6 and named: The "Monte Confurco" Case.

7. On 28 November 2000, the Agent of Seychelles submitted by courier the original of the Application, which incorporated the corrections referred to in paragraph 3. The Application was accompanied by the original of the letter referred to in paragraph 1. A certified copy of the original of the Application was transmitted on the same date to the Minister for Foreign Affairs of France.

8. In accordance with article 24, paragraph 3, of the Statute of the Tribunal, States Parties to the Convention were notified of the Application by a note verbale from the Registrar dated 29 November 2000. Pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Secretary-General of the United Nations was notified by the Registrar on 28 November 2000 of the receipt of the Application.

9. On 30 November 2000, the Registrar was notified of the appointment of Mr. Michel Trinquier, Deputy Director for the Law of the Sea, Fisheries and the Antarctic of the Office of Legal Affairs of the Ministry of Foreign Affairs of France, as Agent of France, by a letter, transmitted by facsimile, from the Deputy Director of Legal Affairs, Ministry of Foreign Affairs, Paris, addressed to the Registrar.

10. In accordance with articles 45 and 73 of the Rules, on 1 December 2000, the President held a teleconference with the Agents of the parties and ascertained their views regarding the order and duration of the presentation by each party and the evidence to be produced during the oral proceedings.

11. Pursuant to article 72 of the Rules, information regarding witnesses and experts was submitted by the Agent of Seychelles to the Tribunal on 28 November 2000 and on 5 and 8 December 2000, and by the Agent of France on 1 and 7 December 2000.

12. On 6 December 2000, France transmitted by facsimile its Statement in Response, a copy of which was transmitted forthwith to the Agent of Seychelles.

13. On 5, 6 and 8 December 2000, the Agent of Seychelles submitted additional documentation, copies of which were transmitted to the Agent of France.

14. On 7 December 2000, the Agent of France submitted additional documentation, copies of which were transmitted to the Agent of Seychelles.

15. After the closure of the written proceedings and prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 6 December 2000 in accordance with article 68 of the Rules.

16. On 7 December 2000, the President held consultations with the Agents of the parties in accordance with article 45 of the Rules.

17. Prior to the opening of the oral proceedings, the parties submitted documents required under paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal.

18. Pursuant to article 67, paragraph 2, of the Rules, copies of the pleadings and documents annexed thereto were made accessible to the public from the date of opening of the oral proceedings.

19. Oral statements were presented at four public sittings held on 7 and 8 December 2000 by the following:

On behalf of Seychelles:	Mr. Ramón García Gallardo, Agent, Mr. Jean-Jacques Morel, Deputy Agent.
On behalf of France:	Mr. Michel Trinquier, Agent, Mr. Jean-Pierre Quéneudec, Counsel, Mr. Jacques Belot, Counsel.

20. The Agent of Seychelles, in the course of his statement, presented a number of computer-generated exhibits which were displayed on video monitors, including the following:

- a nautical chart showing areas around the Kerguelen Islands; a nautical chart showing the areas covered by the Convention on the Conservation of Antarctic Marine Living Resources ("CCAMLR"); a nautical chart showing the route said to have been taken by the *Monte Confurco* and the position where the *Monte Confurco* is alleged to have been intercepted by the French surveillance frigate *Floréal*; a nautical chart showing areas where the *Monte Confurco* was said to have been fishing;

- slides giving information on the value of the *Monte Confurco* and a calculation of the proposed amount of bond.

The Agent of Seychelles also presented a lamp, radio transmitter and battery said to be components of buoys used in long-line fishing.

In the course of his statement, the Agent of Seychelles referred to:

- photographs said to show equipment used by the *Monte Confurco* for long-line fishing preparation;

- photographs said to show the refrigerated hold and factory of *the Monte Confurco*;

- photographs showing fish alleged to have been found on board the *Monte Confurco*.

The original of each exhibit was delivered to the Registrar and duly registered.

21. At a public sitting held on 7 December 2000, Mr. Guy Duhamel, Director of the Laboratory of Ichthyology, Museum of Natural History, Paris, was called as expert by the Agent of France and examined by him. Mr. Duhamel was cross-examined by the Agent of Seychelles. In the course of the testimony of the expert, a number of exhibits were displayed on video monitors, including a nautical chart showing the route said to have been taken by the *Monte Confurco* from 4 to 8 November 2000, as well as isobaths around the Kerguelen Islands and a map showing CCAMLR statistical zones. The original of each exhibit was delivered to the Registrar and duly registered.

22. On 7 December 2000, a list of points and issues which the Tribunal would like the parties specially to address was communicated to the Agents.

23. At a public sitting held on 8 December 2000, Mr. Antonio Alonso Pérez, merchant navy captain and marine surveyor, was called as expert by the Agent of Seychelles and examined by him. Mr. Alonso Pérez gave evidence in Spanish. The necessary arrangements were made for the statement of the expert to be interpreted into the official languages of the Tribunal.

24. On 8 December 2000, the Agent of Seychelles and the Agent of France submitted written responses to points and issues referred to in paragraph 22.

25. In the Application and in the Statement in Response, the following submissions were presented by the parties:

On behalf of Seychelles,
in the Application:

[*Translation from French*]

1. To declare that the Tribunal has jurisdiction under article 292 of the United Nations Convention on the Law of the Sea to hear the application submitted today;

2. To declare the present application admissible;

3. To declare that the French Republic has contravened article 73 (4) by not properly giving notice of the arrest of the vessel "MONTE CONFURCO" to the Republic of Seychelles;

4. To declare that the guarantee set by the French Republic is not reasonable as to its amount, nature or form;

5. With respect to the Master of the vessel "MONTE CONFURCO", Mr. José Pérez Argibay,

- To ask, as an interlocutory measure for reasons of due process, that the French Republic allow the Captain to attend the hearing which is shortly to take place in Hamburg;

- To find that the French Republic has failed to observe the provisions of the Convention concerning prompt release of masters of arrested vessels;

- To require the French Republic promptly to release the Master, without bond, in light of the presence of the ship, cargo, etc. as a reasonable guarantee, given the impossibility of imposing penalties of imprisonment against him and the fact that he is a European citizen;

- To find that the failure of the French Republic to comply with the provisions of article 73 (3) in applying to the Master measures of a penal character constitutes a *de facto* unlawful detention;

6. To set a bond in the maximum amount of 2,200,000 French francs, based upon:

- 200,000 French francs for failure to notify presence;

- 2,000,000 French francs for a presence of 24 hours in the exclusive economic zone without giving notice and up to 4 tonnes of catch theoretically taken in the worst of cases, as the sole admissible evidence of presumption;

7. With regard to the nature of the bond, that the Tribunal consider that the value of the cargo seized, the fishing gear seized, the bait and the gasoil constitute part of the guarantee; according to our calculations, the value of the foregoing being 9,476,382 French francs;

8. That the Tribunal choose between the financial instrument [*constitution financière*] issued by a European bank or a guarantee comprised of the value of an equivalent number of tonnes to be immediately discharged;

9. With regard to the form of the financial bond, as a subsidiary measure, in the event that the Tribunal chooses to set a symbolic financial bond, the Applicant requests that the Tribunal note its desire for a bank guarantee by a leading European bank, rather than

payment in cash, to be deposited with the French Republic unless the parties decide that it be deposited with the Tribunal, in exchange for the release of the vessel.

On behalf of France,
in the Statement in Response:

[*Translation from French*]

On the basis of the foregoing presentation of facts and considerations of law, the Government of the French Republic, while reserving the right to supplement or amend the present submissions, as appropriate, requests the Tribunal, rejecting the second submission made on behalf of the Republic of Seychelles, to declare and adjudge:

1. that the bond set by the competent French court for the release of the "Monte Confurco" is reasonable in the circumstances of the case, in light of all the relevant factors;

2. that the application submitted to the Tribunal on 27 November 2000 on behalf of the Republic of Seychelles is therefore not admissible.

26. In accordance with article 75, paragraph 2, of the Rules, the following final submissions were presented by the parties at the end of the hearing:

On behalf of Seychelles:

[*Translation from French*]

1. To declare that the Tribunal has jurisdiction under article 292 of the United Nations Convention on the Law of the Sea to hear the application submitted today;

2. To declare the present application admissible;

3. To declare that the French Republic has contravened article 73 (4) by not properly giving notice of the arrest of the vessel "MONTE CONFURCO" to the Republic of Seychelles;

4. To declare that the guarantee set by the French Republic is not reasonable as to its amount, nature or form;

5. With respect to the master of the vessel "MONTE CONFURCO", Mr. José Pérez Argibay,

- To find that the French Republic has failed to observe the provisions of the Convention concerning prompt release of masters of arrested vessels;

- To require the French Republic promptly to release the master, without bond, in light of the presence of the ship, cargo, etc. as a reasonable guarantee, given the

impossibility of imposing penalties of imprisonment against him and the fact that he is a European citizen;

- To find that the failure of the French Republic to comply with the provisions of article 73 (3) in applying to the master measures of a penal character constitutes a *de facto* unlawful detention;

6. With regard to the vessel, to order its release upon the posting of a guarantee in the maximum amount of 2,200,000 FF, based upon:

- 200,000 FF for failure to notify presence;

- 2,000,000 FF for a presence of 24 hours in the exclusive economic zone without giving notice and up to 4 tonnes of catch theoretically taken in the worst of cases, as the sole admissible evidence of presumption;

7. With regard to the nature of the bond, that the Tribunal consider that the value of the cargo seized, the fishing gear seized, the bait and the gasoil constitute part of the guarantee; according to our calculations, the value of the foregoing being 9,800,000 FF;

8. That the Tribunal choose between the financial instrument [*constitution financière*] issued by a European bank or a guarantee comprised of the value of an equivalent number of tonnes or other items according to our calculations;

9. With regard to the form of the financial bond, as a subsidiary measure, in the event that the Tribunal chooses to set a symbolic financial bond, the Applicant requests that the Tribunal note its desire for a bank guarantee by a leading European bank, of the same content as the guarantee already posted with the French Republic in the "*CAMOUCO" Case* in consideration of the release of the vessel.

On behalf of France:

[*Translation from French*]

The Government of the French Republic requests the Tribunal, rejecting the second submission made on behalf of the Republic of Seychelles, to declare and adjudge:

1. that the bond set by the competent French court for the release of the "Monte Confurco" is reasonable in the circumstances of the case, in light of all the relevant factors;

2. that the Application submitted to the Tribunal on 27 November 2000 on behalf of the Republic of Seychelles is therefore not admissible.

Factual background

27. The *Monte Confurco* is a fishing vessel, flying the flag of Seychelles. Its owner is the Monteco Shipping Corporation, a company registered in Seychelles. According to the Certificate of the Seychelles Registry dated 3 March 2000, the *Monte Confurco* was registered on 2 October 1999 in Seychelles. Seychelles provided the *Monte Confurco* with fishing licence no. 710 to engage in fishing in international waters.

28. On 27 August 2000, the *Monte Confurco* left Port Louis (Mauritius) to engage in long-line fishing in the Southern seas. Its Master was Mr. José Manuel Argibay Pérez, a Spanish national.

29. On 8 November 2000, at 11:25 hours, the *Monte Confurco* was boarded by the crew of the French surveillance frigate *Floréal* in the exclusive economic zone of the Kerguelen Islands in the French Southern and Antarctic Territories.

30. A procès-verbal of violation (*procès-verbal d'infraction*) No. 1/00 was drawn up on 8 November 2000 by the Captain of the *Floréal* against the Master of the *Monte Confurco* for having:

[*Translation from French*]

> Failed to announce his presence and the quantity of fish carried aboard to the Head of the District of the Kerguelen Islands.
>
> Fished without having obtained the prior authorization required by law.
>
> Attempted to evade or for having evaded investigation by the agents responsible for policing fishing activities.

31. Following the procès-verbal of violation No. 1/00 of 8 November 2000, another procès-verbal (*procès-verbal d'appréhension)* No. 2/00 was drawn up on 9 November 2000 by the Captain of the *Floréal*, recording therein the *apprehension* of the *Monte Confurco*, the fish catch, the navigation and communication equipment, computer equipment, and documents of the vessel and of the crew.

32. On 8 November 2000, at 23:20 hours, the *Monte Confurco* was rerouted and escorted under the supervision of the French navy to Port-des-Galets, Réunion, where it arrived on 19 November 2000.

33. On 20 November 2000, the Regional and Departmental Director of Maritime Affairs of Réunion drew up three procès-verbaux of seizure (*procès-verbaux de saisie*). The following in support of the charges levelled therein was extracted from the procès-verbal of violation:

[*Translation from French*]

1. Observation of the presence of the ship "MONTE CONFURCO" inside the French economic zone 90 miles to the west of the Kerguelen Islands at 0700 hours on 8 November.

2. Observation that no announcement of entry into the exclusive economic zone of the Kerguelen Islands was made.

3. Observation of long-lines in the water identical to those of the *Monte Confurco*, whose numbers form logical sequences, whereas no other fishing ship was present in the zone.

4. Observation of defrosted bait that had been jettisoned into the sea.

5. Observation of small frozen fish and fishhooks to the rear of the deck amidships.

6. Observation of topped and gutted toothfish at temperatures of between –1.6 degrees C and –2.4 degrees C in the main refrigerated hold that was at a temperature of –20 degrees C.

7. Observation that the factory had recently been cleaned and that there was fresh blood and fresh waste.

8. Observation of the presence of 158 tonnes of toothfish on board.

34. Of the three procès-verbaux of seizure referred to in paragraph 33, procès-verbal No. 58/AM/00 provided for the seizure of the toothfish on board the vessel. It estimated the catch at 158 tonnes and its value at 9 million French francs. It further decided that the fish should be sold by means of a limited tender and that the proceeds should be credited to the public treasury until court orders were obtained in respect of the proceeds. Procès-verbal No. 59/AM/00 provided for the seizure of all the fishing gear and estimated the new replacement value of this material at 300,000 French francs (FF). Procès-verbal No. 60/AM/00 provided for the seizure of the vessel, its equipment and documents, estimated the value of the ship at 15 million French francs and decided that the ship would be docked at Port-des-Galets in Réunion. The procès-verbaux record that the Master of the *Monte Confurco* refused to sign them.

35. On 20 November 2000, the Regional and Departmental Director of Maritime Affairs of Réunion moved the court of first instance (*tribunal d'instance*) at Saint-Paul for confirmation of the arrest of the vessel and for its release subject to prior payment of a bond of 95,400,000 FF, plus judicial costs.

36. On 21 November 2000, the Master of the vessel was charged and placed under court supervision (*contrôle judiciaire*) by the judge appointed by the Chief Magistrate of the *tribunal de grande instance* at Saint-Denis. The judge ordered that the Master should surrender his passport and not leave Réunion.

37. In its order of 22 November 2000, the court of first instance at Saint-Paul noted, among other things, that the vessel *Monte Confurco* entered the exclusive economic zone of the Kerguelen Islands without prior authorization and without advising the head of a district of the nearest archipelago of its presence, or declaring the tonnage of fish carried on board (in violation of the provisions of article 2 of Law 66-400 of 18 June 1966, as amended by the Law of 18 November 1997) and that the fact that the vessel was found in the exclusive economic zone of the Kerguelen Islands with a certain tonnage of toothfish on board without having given notice of its presence or declaring the quantity of fish carried raised the "presumption" that the whole of the catch was unlawfully fished in the exclusive economic zone of the Kerguelen Islands.

38. On the amount of the bond to be fixed, the court of first instance at Saint-Paul took the following into account:

1) the value of the ship appraised by Mr. Chancerel, marine surveyor, at 15 million French francs;

2) the fines incurred by the Master of the vessel (on the basis of 158 tonnes of fish caught and the provisions of Law No. 66-400 of 18 June 1966, as amended by the Law of 18 November 1997) calculated at 79 million French francs;

3) compensation of less than 100,000 FF which victims are generally granted.

39. Keeping the aforesaid in view, the court set the bond as follows:

- to secure the appearance of the captain of the arrested vessel: 1,000,000 FF;

- to secure payment of damage caused by the contraventions found: 400,000 FF;

- to secure payment of fines incurred and confiscation of the vessel: 55,000,000 FF.

The total bond was thus fixed at 56,400,000 FF.

40. The court confirmed the arrest of the *Monte Confurco* and declared that its release would be subject to the payment of a bond in the amount of 56,400,000 FF in cash, certified cheque or banker's draft, to be paid into the Deposits and Consignments Office (*Caisse des Dépôts et Consignations*).

41. The court also observed that, by virtue of the provisions of articles 73, paragraph 2, and 292 of the Convention, the bond must be "reasonable", that the overall balance between the amount, form and nature of the bond must be reasonable and that the evaluation of reasonableness should be based on the seriousness of the contraventions ascribed to the Master of the arrested vessel, the penalties that could be imposed under the laws of the arresting State, the value of the arrested vessel and the value of the cargo. These observations echo the holdings of this Tribunal in paragraphs 66 and 67 of its judgment in the "*Camouco*" *Case*.

42. In support of its order, the court relied on the following:

(a) Article 3 of Law No. 83-582 of 5 July 1983, as amended, concerning the regime of seizure and supplementing the list of agents authorized to establish offences in matters of sea fishing;

(b) Articles 2 and 4 of Law No. 66-400 of 18 June 1966, as amended by the Law of 18 November 1997, on sea fishing and the exploitation of marine products in the French Southern and Antarctic Territories;

(c) Article 142 of the Code of Criminal Procedure.

43. Article 3 of Law No. 83-582 of 5 July 1983, as amended, reads as follows:

[*Translation from French*]

The competent authority may seize the vessel or boat that has been used to fish in contravention of laws and regulations, regardless of the manner in which the violation is established.

The competent authority shall conduct or arrange for the conducting of the vessel or boat to a port designated by that authority; it shall prepare a procès-verbal of seizure and the vessel or boat shall be handed over to the Maritime Affairs Department.

Within a time-limit not exceeding seventy-two hours after the seizure, the competent authority shall submit to the judge of first instance of the place of the seizure an application accompanied by the procès-verbal of seizure in order for the judge to confirm, in an order made within seventy-two hours, the seizure of the vessel or boat or to decide on its release.

Whatever the circumstances, the order shall be made within six days of the arrest referred to in article 7 or of the seizure.

The release of the vessel or boat shall be decided by the judge of first instance of the place of the seizure upon the posting of a bond, the amount and arrangements for payment of which he shall decide in accordance with the provisions of article 142 of the Code of Criminal Procedure.

44. Articles 2 and 4 of Law No. 66-400 of 18 June 1966, as amended, read as follows:

[*Translation from French*]

Article 2

No one may fish and hunt marine animals, or engage in the exploitation of marine products, whether on land or from vessels, without having first obtained authorization.

Any vessel entering the exclusive economic zone of the French Southern and Antarctic Territories shall be obliged to give notification of its presence and to declare the tonnage of fish held on board to the chief district administrator of the nearest archipelago.

Article 4

Any person who fishes, hunts marine animals or exploits marine products on land or on board a vessel, without having first obtained the authorization required under article 2, or fails to give notification of entering the economic zone, or to declare the tonnage of fish held on board, shall be punished with a fine of 1,000,000 francs and six months' imprisonment, or with one only of these two penalties.

Anyone fishing, in prohibited zones or during prohibited periods, in contravention of the provisions of the orders provided for under article 3, shall be subject to the same penalties.

However, the statutory maximum provided for in the first paragraph shall be increased by 500,000 francs for every tonne caught over and above two tonnes without the authorization provided for under article 2 or in breach of the regulations concerning prohibited zones and periods issued pursuant to article 3.

Concealment, within the meaning of article 321-1 of the Penal Code, of products caught without the authorization provided for in article 2 or in breach of the regulations concerning prohibited zones and periods issued pursuant to article 3 shall be subject to the same penalties.

45. Article 142 of the Code of Criminal Procedure reads as follows:

[*Translation from French*]

When the accused is required to furnish security, such security guarantees:

1. the appearance of the accused, whether under charges or not, at all stages of the proceedings and for the execution of judgment, as well as, where appropriate, the execution of other obligations which have been imposed upon him;

2. payment in the following order of:

a) reparation of damages caused by the offence and restitution, as well as alimony debts when the defendant is being prosecuted for failure to pay this debt;

b) fines.

The decision which compels the defendant to furnish security shall determine the sums assigned to each of the two parts of the security.

Article 142-1

The examining magistrate can, with the defendant's consent, order that the part of the security set to guarantee the rights of the victim or the creditor of an alimony debt be deposited to them as a provisional award, on their request.

This deposit may also be ordered, even without the consent of the defendant, when an enforceable decision of justice has granted the victim or creditor a provisional award in conjunction with facts which are the subject of proceedings.

Article 142-2

The first part of the security is refunded if the accused, whether under charges or not, has appeared at all stages of the proceedings, has satisfied the obligations of court supervision, and has submitted himself to the execution of the judgment.

It is forfeited to the State in contrary cases, except by reason of a legitimate excuse.

It is, nevertheless, refunded in case of dismissal, pardon or acquittal.

Article 142-3

The sum set aside for the second part of security which has not been deposited to the victim of the offence or to the creditor of an alimony debt shall be refunded in the case of dismissal and, unless article 372 is applied, in case of pardon or acquittal.

In case of conviction, the security is used in accordance with the provisions of article 142 (paragraph 1, section 2). Any surplus shall be refunded.

The conditions for application of the present article shall be fixed by a decree in Council of State.

46. The Respondent also relied upon the laws referred to in paragraph 42 in support of its contention that the French legislation provides for confiscation of the vessel, the fish and fishing gear involved in violations of fishery legislation.

47. According to the Applicant, on 7 November 2000, at 10:00 hours universal time, the *Monte Confurco* was outside French waters at the approximate position 47° 40' S latitude and 63° 30' E longitude; the vessel had already been at sea for about two-and-a-half months; the Master intended to spend the final weeks of the fishing expedition on the Williams Bank (located to the south-east of the exclusive economic zone of the Kerguelen Islands) in international waters and outside the CCAMLR area in order to lay down lines for the last time; and the refrigerated holds of the ship were already half-full with roughly 158 tonnes of frozen toothfish.

48. The Applicant states that, in order to take the shortest route and avoid crossing the CCAMLR fishing area, the Master of the vessel decided to traverse the exclusive economic zone of the Kerguelen Islands on a south-east bearing in order to reach Williams Bank as soon as possible. The Applicant further maintains that it was technically impossible for the Master to notify his entry into the exclusive economic zone or the tonnage of frozen fish carried on board, since the fax machine on board had broken down, which was duly mentioned in the logbook. The Applicant states that the officers of the *Floréal*, when they conducted their on-board inspection of the vessel, noted that the fax machine could only receive.

49. The Applicant also contends, among other things, that the officers of the *Floréal* did not find any trace of fresh fish in the holds, save two units of fish which were kept cold for use in the on-board galley, that they did not find any trace of preparation for fishing on the decks of the ship, and that they also found that the 158 tonnes of toothfish on board were frozen to a very low temperature. It further maintains that they found a clean but wet factory and empty and inoperative freezing tunnels. No attempt was made to camouflage the name of the ship and the flag of Seychelles, which were in fact visible from all sides.

50. In view of the aforesaid, the Applicant contends that the *Monte Confurco* was neither in the process of fishing, nor of preparing to fish, in the exclusive economic zone of the Kerguelen Islands.

51. The Respondent does not agree with the Applicant's contention with regard to the location of the vessel on 7 November 2000. It points out that the presence of the *Monte Confurco* inside the French exclusive economic zone was detected at 90 miles to the west of the Kerguelen Islands on 8 November 2000, at 07:00 hours local time and 02:00 hours universal time. The approximate position of the ship at that time was 49° 27.9' S latitude and 66° 37.5' E longitude. The Respondent contends that the *Monte Confurco* could not have covered the distance between the two points within the time indicated by the Applicant and that the vessel would have been within the exclusive economic zone of the Kerguelen Islands for a number of days prior to 8 November 2000 and fishing during that period.

52. The Applicant, however, points out that the vessel covered the distance between its position on 7 November 2000 and 8 November 2000 sailing at an average of 9 to 10 knots, since the vessel had 1,200 horsepower, enabling it to reach a speed of 13 knots.

53. The Respondent also contends that the breakdown of the fax machine could not justify failure to notify the vessel's entry into the exclusive economic zone of the Kerguelen Islands, since the vessel was equipped with radio-telephone equipment and an INMARSAT station capable of sending and receiving telephone messages.

54. Mr. Duhamel, the scientist called as an expert on behalf of the Respondent, states that it was not possible to conduct long-line fishing in the areas that the Master of the *Monte Confurco* claimed that he had fished. From a scientific point of view, he argues, the depths of water – between 3000 and 4000 metres – did not permit fishing of this species, i.e., the toothfish.

55. For its part, the Applicant contends that the expert based his testimony on research conducted on board a scientific vessel or French fishing vessels which were principally trawlers with a fishing capacity limited to a depth of 1000 metres. Alternatively, long-line technology of a different type, which does not go below 1500 metres, is used. The Applicant adds that Spanish fishermen do carry out fishing of toothfish in waters up to a depth of 2,500 to 2,700 metres.

Jurisdiction

56. The Applicant alleges that the Respondent has not complied with the provisions of article 73 of the Convention for the prompt release of a vessel or its crew. It further alleges that the bond set by the Respondent was excessive, that the parties did not reach agreement within 10 days of the time of detention to submit the matter to another court or tribunal, and that, accordingly, the Tribunal has jurisdiction to hear the Application under article 292 of the Convention.

57. The Tribunal will, at the outset, examine the question whether it has jurisdiction to entertain the Application. Article 292 of the Convention sets out the requirements to be satisfied to found the jurisdiction of the Tribunal. It reads as follows:

Article 292
Prompt release of vessels and crews

1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

2. The application for release may be made only by or on behalf of the flag State of the vessel.

3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.

4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

58. Seychelles and France are both States Parties to the Convention. Seychelles ratified the Convention on 16 September 1991 and the Convention entered into force for Seychelles on 16 November 1994. France ratified the Convention on 11 April 1996 and the Convention entered into force for France on 11 May 1996. The status of Seychelles as the flag State of the *Monte Confurco*, both at the time of the incident in question and now, is not disputed. The parties did not agree to submit the question of release from detention to any other court or tribunal within 10 days of the time of detention. The Application has been duly made on behalf of Seychelles in

accordance with article 292, paragraph 2, of the Convention. The Application satisfies the requirements of articles 110 and 111 of the Rules.

59. The Respondent does not contest the jurisdiction of the Tribunal.

60. For the above reasons, the Tribunal finds that it has jurisdiction to entertain the Application.

Non-compliance with article 73, paragraphs 3 and 4, of the Convention

61. The Applicant contends that the placement of Mr. José Manuel Pérez Argibay, the Master of the *Monte Confurco*, under court supervision constitutes a *de facto* detention and a grave violation of his personal rights, contrary to the provisions of article 73, paragraph 3, of the Convention. It further contends that Seychelles was not given proper notification of the arrest of the vessel in terms of article 73, paragraph 4, of the Convention.

62. The Respondent states that, under article 292 of the Convention, the Tribunal's competence does not extend to the adjudication of the allegations made by the Applicant. Further, it maintains that the allegations are not based upon facts. The Respondent denies that court supervision amounts to detention, since such supervision does not deprive the Master of the vessel of his liberty. Attention was also drawn to the letter dated 9 November 2000 from the Prefect of Réunion transmitted by facsimile on 10 November 2000 to the Consul General of Seychelles in Paris, wherein information was given on the measures taken against the vessel and its Master.

63. As held in the "*Camouco*" *Case*, in proceedings under article 292 of the Convention, submissions concerning the alleged violations of article 73, paragraphs 3 and 4, of the Convention are not admissible (Judgment of 7 February 2000, paragraph 59). The question of the implications of court supervision in connection with the request made for the release of the Master of the vessel will be addressed in paragraph 90.

Non-compliance with article 73, paragraph 2, of the Convention

64. The Tribunal notes that the Applicant alleges that there has been non-compliance with article 73, paragraph 2, of the Convention, which is a provision of the Convention "for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security".

65. The Applicant submits that the bond set by the court of first instance at Saint-Paul in the amount of 56,400,000 FF for the release of the *Monte Confurco* and its Master is not a "reasonable bond or other security" within the meaning of article 73, paragraph 2, of the Convention and that the Tribunal should, in exercise of its powers under article 292 of the Convention, fix a "reasonable" bond and order the release of the vessel upon the posting of such a bond, as well as the release of the Master without a bond, since he could not be subject to imprisonment. The Applicant contends that the bond should be set in the amount of 2,200,000 FF, based upon:

- 200,000 FF for failure to notify presence;

- 2,000,000 FF for a presence of 24 hours in the exclusive economic zone without giving notice and up to 4 tonnes of catch theoretically taken in the worst of cases, as the sole admissible evidence of presumption.

66. The Respondent requests the Tribunal to hold that the bond set by the French court is reasonable in the circumstances of the case and in light of all the relevant factors.

67. When an application for prompt release of a vessel and its crew is filed, the Tribunal, as stated in article 113 of the Rules, is required to decide whether or not the allegation made by the Applicant is well-founded. If the Tribunal decides that the allegation is well-founded, it is required to determine the amount, nature and form of the bond or financial security to be posted for the release of the vessel or the crew.

68. It is accordingly necessary for the Tribunal to determine whether the bond imposed by the French court is reasonable.

69. The Tribunal notes that for the purposes of these proceedings the context for determining what is a reasonable bond flows from article 73 of the Convention. Paragraphs 1 and 2 of article 73 read as follows:

> 1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
>
> 2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

70. Article 73 identifies two interests, the interest of the coastal State to take appropriate measures as may be necessary to ensure compliance with the laws and regulations adopted by it on the one hand and the interest of the flag State in securing prompt release of its vessels and their crews from detention on the other. It strikes a fair balance between the two interests. It provides for release of the vessel and its crew upon the posting of a bond or other security, thus protecting the interests of the flag State and of other persons affected by the detention of the vessel and its crew. The release from detention can be subject only to a "reasonable" bond.

71. Similarly, the object of article 292 of the Convention is to reconcile the interest of the flag State to have its vessel and its crew released promptly with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties.

72. The balance of interests emerging from articles 73 and 292 of the Convention provides the guiding criterion for the Tribunal in its assessment of the reasonableness of the bond. When determining whether the assessment made by the detaining State in fixing the bond or other

security is reasonable, the Tribunal will treat the laws of the detaining State and the decisions of its courts as relevant facts. The Tribunal, however, wishes to make it clear that, under article 292 of the Convention, it is not an appellate forum against a decision of a national court.

73. The Tribunal is of the view that the amount of a bond should not be excessive and unrelated to the gravity of the alleged offences. Article 292 of the Convention is designed to ensure that the coastal State, when fixing the bond, adheres to the requirement stipulated in article 73, paragraph 2, of the Convention, namely, that the bond it fixes is "reasonable" based on an assessment of relevant factors.

74. The proceedings under article 292 of the Convention, as clearly provided in paragraph 3 thereof, can deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. Nevertheless, in the proceedings before it, the Tribunal is not precluded from examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond. Reasonableness cannot be determined in isolation from facts. It should, however, be emphasized that a prompt release proceeding, as held by this Tribunal in the *M/V "SAIGA" Case*, is characterized by the requirement, set out in article 292, paragraph 3, of the Convention, that it must be conducted and concluded "without delay" (Judgment of 4 December 1997, paragraph 47). This, too, suggests a limitation in prompt release proceedings on the extent to which the Tribunal could take cognizance of the facts in dispute and seek evidence in support of the allegations made by the parties.

75. When under article 292 of the Convention the Tribunal is called upon to determine what constitutes a reasonable bond, its determination must be based on the Convention and other rules of international law not incompatible with the Convention.

76. In the *"Camouco" Case*, the Tribunal specified the factors relevant in an assessment of the reasonableness of bonds or other financial security, as follows:

> The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form. (Judgment of 7 February 2000, paragraph 67).

This is by no means a complete list of factors. Nor does the Tribunal intend to lay down rigid rules as to the exact weight to be attached to each of them. These factors complement the criterion of reasonableness specified by the Tribunal in the *M/V "SAIGA" Case* as follows:

> In the view of the Tribunal, the criterion of reasonableness encompasses the amount, the nature and the form of the bond or financial security. The overall balance of the amount, form and nature of the bond or financial security must be reasonable. (Judgment of 4 December 1997, paragraph 82).

77. The Tribunal will now deal with the application of the various factors in the present case.

78. Turning to the gravity of the offences alleged to have been committed in the present case, they relate to the conservation of the fishery resources in the exclusive economic zone.

79. The Respondent has pointed out that the general context of unlawful fishing in the region should also constitute one of the factors which should be taken into account in assessing the reasonableness of the bond. In its view, this illegal fishing is a threat to the future resources and the measures taken under CCAMLR for the conservation of toothfish. The Respondent states that "[a]mong the circumstances constituting what one might call the 'factual background' of the present case, there is one whose importance is fundamental. That is the general context of unlawful fishing in the region concerned." The Tribunal takes note of this argument.

80. The Tribunal has taken note of the range of penalties which, under French law, are imposable for the alleged offences. These penalties underline that under French law such offences are grave.

81. The Applicant, however, argues that the only offence committed by the Master of the vessel was his failure to notify the entry of the *Monte Confurco* into the exclusive economic zone of the Kerguelen Islands and the tonnage of fish it carried on board, and that the vessel did not fish in the said zone.

82. The Tribunal notes the admission of the Applicant that the Master did not notify the presence of the vessel in the exclusive economic zone. The Tribunal further notes that the vessel carried on board a large quantity of toothfish and that it was equipped with radio-telephone equipment and an INMARSAT station capable of sending and receiving telephone messages.

83. The parties do not seem to disagree on the penalties imposable under the French laws which have been noted in paragraphs 42 to 45. These laws provide for imposition of fines, award of damages and possible confiscation of vessels, fishing gear and fish illegally caught. The order of the court of first instance at Saint-Paul took into account the penalties imposable under French law, as may be seen from paragraph 38. The Applicant, however, argues that the maximum penalties taken into account by the French court were highly exaggerated; that, on the facts of the case, these penalties could not be imposed; and that the practice of French courts does not warrant the application of such high penalties.

84. As regards the value of the *Monte Confurco*, the parties differ widely. In its order, the court of first instance at Saint-Paul has fixed the value of the vessel at 15,000,000 FF, placing reliance on the appraisal made by Mr. Chancerel, a marine surveyor. Later, in the course of the public sitting held on 7 December 2000, the Respondent relied upon an expert opinion given by Barry Rogliano Salles, which placed the value of the vessel at US$ 1,500,000, a value some 25% less than that given by Mr. Chancerel. As against this, the Applicant relied upon reports by two experts, Mr. Albino Moran, who stated that the value of the vessel was somewhere between US$ 400,000 and US$ 450,000, and Mr. Prassant Kirmar of BP Shipping Agency Ltd., who put the value of the vessel in the region of US$ 500,000. During the oral proceedings, expert testimony was offered by Mr. Antonio Alonso Pérez, on behalf of the Applicant and not challenged by the

Respondent, to the effect that the value of the *Monte Confurco* was about US$ 345,680. The vessel is not insured for its machinery and hull. The assessment of the value of the vessel as provided by the Applicant corresponds to the amount for which the vessel was sold in 1999. The Tribunal considers that this assessment is reasonable.

85. Turning now to the cargo, both parties estimate the value of the catch on board the *Monte Confurco* at 9,000,000 FF. It may be relevant to mention here that the Respondent also seized the fishing gear, the value of which is estimated by the French authorities at 300,000 FF, and that this valuation is not disputed by the Applicant. The order of the court of first instance at Saint-Paul does not provide for securing confiscation of the fish on board and the fishing gear, and, accordingly, the amount of bond fixed by the court does not incorporate their value. The Respondent contends that the seizure of the fish on board and of the fishing gear is "not before the Tribunal", and that it will be the subject of a different proceeding under French law.

86. The Tribunal, however, considers that the value of the fish and of the fishing gear seized is also to be taken into account as a factor relevant in the assessment of the reasonableness of the bond. The seizures of the fish, the fishing gear and the vessel were effected with reference to the same offences. For the purposes of article 292 of the Convention, the Tribunal considers them as part and parcel of the same proceedings.

87. In its order, the court of first instance at Saint-Paul held that the 158 tonnes of toothfish were found on board, that the fact that the vessel was discovered in the exclusive economic zone of the Kerguelen Islands without prior notification of its entry therein and without declaration of the quantity of fish carried on board "raises the presumption that the whole of the catch was unlawfully fished in the exclusive economic zone" of the Kerguelen Islands. In calculating the amount of the bond, the court of first instance appears to have assumed that the fines the trial judge might impose could correspond approximately to the illegal catch being half of the 158 tonnes.

88. The Tribunal is aware that the expert opinion of the scientist referred to in paragraph 54 suggests that not all the fish on board could have been fished outside the exclusive economic zone of the Kerguelen Islands. The Tribunal does not, however, consider the assumption of the court of first instance at Saint-Paul as being entirely consistent with the information before this Tribunal. Such information does not give an adequate basis to assume that the entire catch on board, or a substantial part of it, was taken in the exclusive economic zone of the Kerguelen Islands; nor does it provide clear indications as to the period of time the vessel was in the exclusive economic zone before its interception.

89. On the basis of the above considerations, and keeping in view the overall circumstances of this case, the Tribunal considers that the bond of 56,400,000 FF imposed by the French court is not "reasonable" within the meaning of article 292 of the Convention.

90. It is not disputed that the *Monte Confurco* has been in detention. However, the parties are in disagreement whether the Master of the vessel is also in detention. It is admitted that the Master is presently under court supervision, that his passport has also been taken away from him by the French authorities, and that, consequently, he is not in a position to leave Réunion. The

Tribunal considers that, in the circumstances of this case, it is appropriate to order the release of the Master in accordance with article 292, paragraph 1, of the Convention.

91. For the above reasons, the Tribunal finds that the Application with respect to the allegation of non-compliance with article 73, paragraph 2, of the Convention is admissible, that the allegation made by the Applicant is well-founded for the purposes of these proceedings and that, consequently, France must release promptly the *Monte Confurco* and its Master upon the posting of a bond or other financial security to be determined by the Tribunal.

Form and amount of the bond or other financial security

92. The Tribunal then comes to the task of determining the amount, nature and form of the bond or other financial security to be posted, as laid down in article 113, paragraph 2, of the Rules.

93. On the basis of the foregoing considerations, the Tribunal is of the view that the security should be in the total amount of 18,000,000 FF. In considering the overall balance of amount, form and nature of the bond or financial security, the Tribunal holds that the monetary equivalent of the 158 tonnes of fish on board the *Monte Confurco* held by the French authorities, i.e., 9,000,000 FF, shall be considered as security to be held or, as the case may be, returned by France to the Applicant. The remaining security, in the amount of 9,000,000 FF, should, unless the parties otherwise agree, be in the form of a bank guarantee, to be posted with France. The Tribunal notes that, in the *"Camouco" Case*, it decided that the bond should be in the form of a bank guarantee (Judgment of 7 February 2000, paragraph 74). No difficulty was encountered in the implementation of this judgment. Consequently, the claim of the Respondent that cash or certified cheque are the only possible forms for the bond does not seem reasonable to the Tribunal.

94. The Tribunal holds that the bank guarantee shall be invoked only if the monetary equivalent of the security held by France is not sufficient to pay the sums as may be determined by a final judgment or decision of the appropriate domestic forum in France.

95. The bank guarantee should, among other things, state that it is issued in consideration of France releasing the *Monte Confurco* and its Master, in relation to the incidents dealt with in the order dated 22 November 2000 of the court of first instance at Saint-Paul and that the issuer undertakes and guarantees to pay to France such sums, up to 9,000,000 FF, as may be determined by a final judgment or decision of the appropriate domestic forum in France or by agreement of the parties. Payment under the guarantee would be due promptly after receipt by the issuer of a written demand by the competent authority of France accompanied by a certified copy of the final judgment or decision or agreement.

Operative provisions

96. For these reasons,

THE TRIBUNAL,

(1) Unanimously,

Finds that the Tribunal has jurisdiction under article 292 of the Convention to entertain the Application made on behalf of Seychelles on 27 November 2000.

(2) Unanimously,

Finds that the claims of Seychelles that France failed to comply with article 73, paragraphs 3 and 4, of the Convention are inadmissible.

(3) Unanimously,

Finds that the Application with respect to the allegation of non-compliance with article 73, paragraph 2, of the Convention is admissible.

(4) By 19 votes to 1,

Finds that the allegation made by the Applicant is well-founded;

IN FAVOUR: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, AKL, VUKAS, WOLFRUM, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS;

AGAINST: *Judge* ANDERSON.

(5) By 19 votes to 1,

Decides that France shall promptly release the *Monte Confurco* and its Master upon the posting of a bond or other security to be determined by the Tribunal;

IN FAVOUR: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, AKL, VUKAS, WOLFRUM, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS;

AGAINST: *Judge* ANDERSON.

(6) By votes 17 to 3,

Determines that the bond or other security shall consist of: (1) an amount of nine million French francs (9,000,000 FF) as the monetary equivalent of the 158 tonnes of fish seized by the French authorities and (2) a bond in the amount of nine million French francs (9,000,000 FF);

IN FAVOUR: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, AKL, VUKAS, WOLFRUM, REVES, MARSIT, EIRIKSSON, NDIAYE;

AGAINST: *Judges* ANDERSON, LAING, JESUS.

(7) Unanimously,

Determines that the bond shall be in the form of a bank guarantee or, if agreed to by the parties, in any other form.

(8) By 18 votes to 2,

Decides that the bank guarantee shall be invoked only if the monetary equivalent of the security held by France is not sufficient to pay the sums as may be determined by a final judgment or decision of the appropriate domestic forum in France;

IN FAVOUR: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, AKL, VUKAS, WOLFRUM, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE;

AGAINST: *Judges* ANDERSON, JESUS.

Done in English and in French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this eighteenth day of December, two thousand, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of the Republic of Seychelles and the Government of the French Republic, respectively.

(Signed) P. CHANDRASEKHARA RAO,
President.

(Signed) Gritakumar E. CHITTY,
Registrar.

Judge MENSAH, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(Initialled) T.A.M.

Judge VUKAS, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(Initialled) B.V.

Judge NDIAYE, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(Initialled) T.M.N.

Vice-President NELSON, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) L.D.M.N.

Judge ANDERSON, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(Initialled) D.H.A.

Judge LAING, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(Initialled) E.A.L.

Judge JESUS, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(Initialled) J.-L.J.

DECLARATION OF JUDGE MENSAH

I agree with the conclusions and decisions of the Tribunal. However, I am troubled by some statements in the Judgment which, in my view, are neither necessary for the decisions nor, indeed, warranted in the context of proceedings for prompt release under article 292 of the Convention. I am particularly concerned because some of the statements come perilously close to an attempt by the Tribunal to enter into the merits of the case pending before the domestic forum in France.

In paragraph 88 of the Judgment, the Tribunal states:

> The Tribunal is aware that the expert opinion of the scientist referred to in paragraph 54 suggests that not all the fish on board could have been fished outside the exclusive economic zone of the Kerguelen Islands. The Tribunal does not, however, consider the assumption of the court of first instance at Saint-Paul as being entirely consistent with the information before this Tribunal. Such information does not give an adequate basis to assume that the entire catch on board, or a substantial part of it, was taken in the exclusive economic zone of the Kerguelen Islands; nor does it provide indication as to the period of time the vessel was in the exclusive economic zone before its interception.

In this statement the Tribunal appears to be criticising the basis on which the court of first instance at Saint-Paul determined the part of the fish on board the vessel that it took into account in fixing the bond to be posted for the release of the vessel and its Master. I consider that this criticism is both unjustified and inappropriate in the circumstances. The Tribunal rightly notes the statement of the court in Saint-Paul to the effect that the failure of the Master to give prior notification of entry into the exclusive economic zone of the Kerguelen Islands or to declare the quantity of fish on board raised a presumption that all the fish found on board had been caught illegally in the exclusive zone. Incidentally, the Respondent had, during the oral proceedings, taken great pains to explain, satisfactorily in my opinion, that this was not a "legal presumption" but rather a presumption of fact on which the French judge (in the pending case against the Master in the domestic forum) would decide "according to his intimate conviction" i.e. "[h]e has to consider the material produced by each party and form an opinion as to whether the *alleged facts* are correct" (ITLOS/PV.00/8, page 11, lines 15–17; emphasis supplied). In any case, it is worth noting that, in spite of the stated presumption that all the fish was caught illegally, the court did not take the full quantity of fish on board into account in fixing the bond to be posted. The amount taken into account by the court was no more than half the 158 tons of fish found on board. The court presumably operated on the basis that, regardless of its own "presumption" that all the fish was caught illegally, it was possible for the judge in the forthcoming trial to come to a different conclusion, on the basis of the evidence to be produced before it by the parties.

The Tribunal is, of course, entitled to disagree with the actual figure chosen by the court of first instance. This is because there is no single correct figure in the circumstances of the case. The possible finding of the judge in the forthcoming trial in France regarding the quantity of fish that was caught illegally could range between the entire 158 tons to none at all. But that does not mean that the basis of computation adopted by the court of first instance is "inconsistent" with the facts. In any event, the basis chosen by the court of first instance at Saint-Paul is no more

"inconsistent with the facts" than whatever was the Tribunal's own basis for determining the amount of fish that the *Monte Confurco* could reasonably have fished in the exclusive economic zone of the Kerguelen Islands. Like the court at Saint- Paul, the Tribunal could only base its computation on a figure ranging between the maximum of 158 tons that the French authorities allege was caught illegally and the minimum of no illegal catch as maintained by the Applicant. Neither figure can be supported or invalidated by the "facts", simply because at this stage there are no facts, but rather claims and counter-claims from the parties. As the Respondent put it: "[a]s regards the facts, of course there are disagreements. That is perfectly normal. The examination of the facts will occur on 8 January next by a French court which will then make a judgement and will either condemn or release" (ITLOS/PV.00/8, page 7, lines 17–19). The Tribunal may be right when it says that these conflicting claims do not give an adequate basis to assume that the entire catch on board, or a substantial part of it, was taken in the exclusive economic zone of the Kerguelen Islands". (In fact they do not provide a basis for assuming that *any of the catch* was taken in the exclusive economic zone.) The Tribunal is also correct to say that the conflicting contentions of the parties "do not provide a clear indication as to the period of time the vessel was in the exclusive economic zone before its interception". However, the pertinent question in this regard is: if these "facts" (disagreements) do not provide an adequate basis for the French court to determine the proportion of the catch to be taken into account in determining a "reasonable bond" under French law, how and why do they provide a basis for the Tribunal in undertaking the same exercise under article 292 of the Convention?

In my view, the answer to the question is that the "information" referred to by the Tribunal does not provide a basis for *any* conclusion regarding the amount of fish that was caught illegally by the *Monte Confurco* in the exclusive economic zone of France. But this is neither surprising nor even pertinent to fixing a reasonable bond in the present case. For the Tribunal is not required to make a determination of any kind on the quantity of fish that was caught illegally or the time spent by the vessel in the exclusive economic zone of the Kerguelen Islands. Indeed it would not be appropriate for it to attempt to do so. Herein lies my concern. The statement of the Tribunal that the information before it does not provide an adequate basis for reaching conclusions on these matters could create the impression that the Tribunal, somehow, considers that it is necessary or appropriate for it to receive evidence and make determinations on these issues in the context of proceedings on an application for prompt release of a ship on its crew pursuant to article 292 of the Convention. The risk that this impression might be created is real, as evidenced by the repeated assertions of the Respondent, during the oral proceedings, that the Tribunal is not competent to deal with the merits of the case, and should not attempt to do so. At one point the Respondent stated: "I recall the texts [of the Rules of the Tribunal] and it seems to be necessary to respect them because certain aspects of the hearing ... were of a somewhat strange character ... . One might have thought that one had been transported at some time before the competent French court dealing with the merits of this case … . The body of judges forming the International Tribunal for the Law of the Sea was, as it were, likened to a popular jury" (ITLOS/PV.00/8, page 13, lines 24–30).

I know that the Tribunal has emphasised that, in proceedings for prompt release under article 292 of the Convention, it "can deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew" (Judgment, paragraph 74). In this regard I agree with the Tribunal that it may be

appropriate for the Tribunal to examine "the facts and circumstance of the case to the extent necessary for a proper appreciation of the reasonableness of the bond" (*ibid.*). I believe, however, that any "examination" of the facts must be limited to what is strictly necessary for an appreciation of the reasonableness or otherwise of the measures taken by the authorities of the arresting State. Similarly, the Tribunal should exercise utmost restraint in making statements that might plausibly imply criticism of the procedures and decisions of the domestic courts. This is especially so where, as in the present case, such criticism is not necessary for the decisions of the Tribunal on the issue of the release of a ship or its crew upon the posting of a reasonable bond. In my opinion, the statements in paragraph 88 of the Judgment come uncomfortably close to exceeding what is necessary and appropriate.

(*Signed*) Thomas A. Mensah

DECLARATION OF JUDGE VUKAS

I voted in favour of the Tribunal's findings contained in paragraph 96 of the Judgment since I agree with these findings with regard to their main objective - that is the release of the *Monte Confurco* and its Master.

I dissociate myself from all statements or conclusions in the Judgment which are based on the proclaimed exclusive economic zone of the Kerguelen Islands.

In my view, it is highly questionable whether the establishment of an exclusive economic zone off the shores of these "uninhabitable and uninhabited" islands (according to Captain Yves-Joseph de Kerguelen-Trémarec)[1] is in accordance with the reasons which motivated the Third United Nations Conference on the Law of the Sea to create that specific legal régime, and with the letter and spirit of the provisions on the exclusive economic zone, contained in the United Nations Convention on the Law of the Sea.

(*Signed*) Budislav Vukas

[1] The Kerguelen Islands, Southern Indian Ocean ‹www.btinternet.com/~sa_sa/kerguelen/kerguelen_islands.html›

DECLARATION OF JUDGE NDIAYE

[Translation]

Reasonableness is determined essentially in terms of the factual and relevant circumstances of the case. The aim is to strike a balance in a given context between the obligation of release under the Convention and the right to prosecute and punish those who contravene the laws and regulations of a given State. Reasonableness may be observed from the outcome or be ascertained.

It must be noted that in release proceedings there is invariably a tendency for applicants to argue that the bond or financial security set by the State that has detained the vessel is exorbitant. They find this to be a convenient means of bringing that State before the international court without even seeking to enter into an agreement within the ten (10) days. The detaining State, for its part, must take care to set a bond or other financial security that is proportionate to the offence, because the bond is always an extremely important relevant fact before the International Tribunal.

The provisions concerning this are rather measured. They refer to "reasonable bond or other security" (article 73, paragraph 2), to "bonding or other appropriate financial security" (article 220, paragraph 7) or to "reasonable procedures such as bonding or other appropriate financial security" (article 226, paragraph 1(b)). This means that the bond must be proportionate to the offence and should not take on a punitive or deterrent character. Otherwise, the challenging of the amount of the bond would turn the Tribunal into a forum for appealing against the decisions of national authorities, which it is not. Rather, the Tribunal applies the provisions of the Convention and other rules of international law that are not incompatible with it (article 293).

(*Signed*) Tafsir Malick Ndiaye

SEPARATE OPINION OF VICE-PRESIDENT NELSON

I have voted with the majority but I would like to make the following brief observations.

The role of the Tribunal in relation to national courts

It must be acknowledged that the power given this Tribunal, under article 292, to order the prompt release of vessels and crews upon the posting of a reasonable bond constitutes to a certain extent "an interference" with the coastal State's judicial authorities. This power is limited. First it applies only when "it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond" i.e. to a limited set of provisions (articles 73, 220 and 226). Secondly and most importantly it is made quite clear that the Tribunal "shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum ...".

The sole task of the Tribunal is to determine a reasonable bond. It is hard to imagine that the Tribunal can make such an assessment without looking into and indeed examining to the extent possible "the facts and circumstances of the case" (paragraph 74 of the Judgment). In other words such a determination cannot be made without entering into, what may be termed, domestic matters. As this Tribunal had occasion to state: "Article 292 provides for an independent remedy and not an appeal against a decision of a national court".[1]

In the same vein it must be remarked that the Tribunal has in fact been invested with the competence to limit – to put a brake on – the discretionary power of the coastal State with respect to the fixing of bonds in certain specific circumstances. That is a necessary consequence which arises from the very nature of the mechanism contained in article 292. The notion of reasonableness is here used to curb the arbitrary exercise of the discretionary power granted to coastal States. As has been observed:

> La notion de raisonnable est souvent invoquée dans le souci de limiter les compétences discrétionnaires que les Etats possèdent dans certains domaines.[2]

"Reasonable" and "suffisante"

France, in its Statement in Response, pointed out that "the French text of article 73, paragraph 2, does not use the adjective 'reasonable' in reference to the bond, but rather the following expression: 'Lorsqu'une caution ou autre garantie suffisante a été fournie …', whereas the English text says: 'the posting of reasonable bond or other security'. This difference between the two language versions certainly does not indicate a difference in meaning

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[1] *The "CAMOUCO" Case* (Panama *v.* France), Judgment, 7 February 2000, paragraph 58.

[2] Jean J.A. Salmon, *Le concept de raisonnable en droit international public, Mélanges offerts à Paul Reuter, Le droit international: unité et diversité*, pp. 447–478 on p .459.

between them but does, however, *provide an indication of the meaning that may be attached to the concept of reasonableness*".[3]

In the oral pleadings, France argued that "[o]ne does understand that the French version of the text of article 73, paragraph 2, of the Convention on the Law of the Sea uses the expression 'une caution ou autre garantie suffisante'. In other languages one talks about a caution or a guarantee which is reasonable – in French 'suffisante' and in other languages 'reasonable'. It boils down more or less to the same thing but there is a difference" (ITLOS/PV.00/6, p. 13). (In French "Aussi comprend-on que la version française du texte de l'article 73, paragraph 2 de la Convention sur le droit de la mer utilise l'expression de: 'une caution ou autre garantie suffisante, ce qui revient quand même au même, mais qui est significatif de la tendance".)

France, in my view, is correct in asserting that the difference between the two language versions i.e. between the English expression "the posting of reasonable bond" and the French expression "[l]orsq'une caution ou autre garantie suffisante a été fournie" does not indicate a difference in meaning. France maintains, however, that it provides an indication of the meaning that may be attached to the concept of reasonableness. In other words the use of the adjective "suffisante" is not without effect in that it brings its own colour to the meaning of the term "reasonable".

The Arabic, Chinese, English, French, Russian and Spanish texts are all authentic versions of the Convention on the Law of the Sea (article 302). Articles 292 and 73 are the two relevant provisions in this case. It appears that all the other language versions use the equivalent of the English term "reasonable" in article 292, paragraph 1, and the majority of the language versions (Arabic, English, Russian and Spanish) utilise the term "reasonable" or its equivalent in article 73, paragraph 2. As the International Law Commission has so rightly remarked "[t]he plurality of the authentic texts of a treaty is always a material factor in its interpretation, since both or all the texts authoritatively state the terms of the agreement between the parties", and it went on pertinently to add "*[b]ut it needs to be stressed that in law there is only one treaty – one set of terms accepted by the parties and one common intention with respect to those terms - even when two authentic texts appear to diverge*."[4]

Of course it is true that the Vienna Convention on the Law of Treaties does not treat the question of comparing the authentic texts as one of the principal means of interpreting a multilingual treaty.[5] Yet it is consonant with practice and principle that "States should in good faith rely on all the texts in order to determine the true meaning of a convention".[6]

This approach, in my opinion, applies especially with respect to the interpretation and application of the Convention on the Law of the Sea. In that regard, it may be noted that in the

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[3] Statement in Response of the French Government, paragraph 11 (emphasis added).

[4] Emphasis added. In its commentary on the draft article which became article 33 in the Vienna Convention on the Law of Treaties (1969). *Yearbook of the International Law Commission*, 1966, Vol. II, p. 225.

[5] See *Yearbook of the International Law Commission*, 1966, Vol. I, pt. 2, 874th meeting, paragraphs 7–25 and paragraph 35.

[6] *Ibid*., p. 209.

Case concerning filleting within the Gulf of St. Lawrence between Canada and France (1986) the arbitral tribunal resorted, *inter alia*, to a comparison of the six authentic texts in order to interpret article 62, paragraph 4(a), of the Convention on the Law of the Sea.[7]

I am, therefore, of the opinion that not much should be made of the apparent divergence between the term “reasonable” and the term “suffisante” as used in article 73, paragraph 2. They simply have the same meaning or at least must be presumed to have the same meaning. The use of the word "suffisante" adds nothing more.

(*Signed*) L. Dolliver M. Nelson

[7] *Reports of International Arbitral Awards*, Vol. XIX, p. 225.

DISSENTING OPINION OF JUDGE ANDERSON

Having dissented from the Judgment on several points, I should like in the short time available to explain my reasons, touching briefly on some other features of the Judgment which I welcome.

The Questions of Admissibility: points 2 and 3 of the *dispositif*

To begin with the latter, I agree that the complaints under article 73, paragraphs 3 and 4, are inadmissible, and that the application under article 73, paragraph 2, is "admissible" in the *strict* sense of that term. The strict meaning has been adopted for the first time by the Tribunal in point 3 of the *dispositif* (paragraph 96 of the Judgment). As a result, the structure of the *dispositif* is much clearer than the *dispositifs* in the *M/V "SAIGA"* and "*Camouco*" *Cases*. I can only endorse and welcome the new approach. The wider sense of the term "admissible" as used in those previous cases, as well as in the pleadings of the parties in the present case, equates to "well-founded", thereby mixing the question of admissibility with the merits. That approach has been the source of some confusion in the past.

The Merits of the Allegation under Article 73, Paragraph 2: points 4 and 5

Paragraphs 65 to 76 of the Judgment set out some general considerations, including the "guiding criterion" of balancing the respective interests of the parties (paragraph 72), with which I have little difficulty. My general approach, however, would be to concentrate more upon the question whether or not the allegation of non-compliance has been made out.

Pursuing this approach, it is clear that in a general sense the respondent has not failed to implement article 73, paragraph 2. France has *inter alia* provided in its legislation for the possibility of release against a reasonable bond by recourse to its courts. In the instant case, the Court of First Instance (CFI) has not failed to act. It has fixed an amount of *caution*. The vessel could leave tomorrow on posting a bond in the prescribed amount and form. In fixing its amount, the CFI considered, naturally, the applicable law, that of the Kerguelen Islands.[1] It also paid particular regard to the requirement, contained in article 292 of the Convention, that a bond should be in an amount which was "reasonable". Finally, it used wording echoing the decision in the "*Camouco" Case*. In other words, the CFI applied directly the law of the Convention in reaching its decision on what was a reasonable bond. It did so after setting out full reasons. (Indeed, the decision is more transparent in some ways than paragraph 93 of the Judgment.) The CFI appears to have calculated the aggregate of the maximum fines and penalties that would be available to the criminal court were the latter to find the charges proven on 9 January 2001. Under the law in force in respect of the EEZ around the Kerguelen Islands, the maximum fine for illegal fishing is linked directly to the amount of illegally caught fish, as determined by the criminal court. This amount lies somewhere between 158 tons and zero. Only the criminal court will be able to assess the amount definitively.

[1] I read with surprise the Declaration made by Judge Vukas. Among many reasons, the Tribunal deals "only with the question of release" in considering applications under article 292.

The CFI, in fixing the bond, appears to have exercised a discretion normally available world-wide in proceedings for release on bail and to have taken into account about half of the 158 tons. In this process, the "worst case" has to be allowed for to an appropriate extent. Splitting the difference is usually considered reasonable. The CFI fixed the amount of the bond at a level well below the maximum fine. The domestic court has a discretion or margin of appreciation. I am not persuaded that the margin was exceeded in this case, especially when viewed against the wider factual background described below.

Paragraph 73 contains an *obiter dictum* to the effect that the amount of a bond should not be excessive and unrelated to the gravity of the offences with which the accused has been charged. In this case, the amount of the bond was directly linked to the charge of illegal fishing in the EEZ and to the fines available to the court in the event of a conviction under the law in force around the Kerguelen Islands. The Convention does not limit the size of fines, although it does exclude generally imprisonment for fisheries offences. It is for the legislators and the courts of States Parties to lay down fines for illegal fishing. Where there is persistent non-observance of the law, deterrent fines serve a legitimate purpose.

There is a particular factor in this connection. Paragraphs 78 and 79 refer, respectively, to the conservation of the resources of the EEZ and to the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR). As part of the various different co-operative efforts of the numerous parties to that Convention to conserve the ecosystem, including fish stocks and birds, coastal States in the region, such as France, have attempted to curb illegal fishing in their EEZs, especially by long-liners. They have sought to do so by enacting appropriate legislation, by maintaining costly fishery patrols, and by prosecuting whenever a patrol vessel has good reason to suspect that an offence of illegal fishing has been committed. In order to deter illegal fishing, high maximum fines and other penalties (not including imprisonment) have been prescribed in legislation. High fines and other penalties have been imposed by the courts upon conviction for serious offences. A recent survey suggests that the increase in the level of fines and other penalties over the past five years has coincided with a decline in the number of sightings of vessels fishing without permission or in an unregulated manner.[2]

The Applicant in this case sought to show that not all the fish on board the vessel had been caught in the EEZ by contending *inter alia* that the vessel had been fishing in Statistical Division 58.5.1 in early November 2000. It should not be overlooked, however, that November was a month when the parties to CCAMLR had prohibited all directed fishing for toothfish in that Division.[3]

Reverting to the balancing of interests (paragraph 72), in my opinion, this "factual background" is relevant in balancing the respective interests of France and the applicant.

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[2] Agnew, "The illegal and unregulated fishery for toothfish in the Southern Ocean, and the CCAMLR catch documentation scheme", *24 Marine Policy* (2000), p. 361, at p. 366, where it is stated that "[t]hese fines have had a significant effect on the number of vessels engaged in IUU fishing …".

[3] Conservation Measure 172/XVIII. Seychelles, whilst using the CCAMLR catch reporting document, is not a party.

Equally, it is material in forming a view of what is a "reasonable" bond within the *overall* scheme of the Convention, which imposes a duty on the coastal State to ensure that "the maintenance of the living resources of the exclusive economic zone is not endangered by over-exploitation" (article 61). The actual interests[4] of the two sides in this case lie on entirely different planes.

With regard to paragraph 84 concerning the valuation of the vessel, I agree with the conclusion to the effect that the Applicant's last valuation is "reasonable". It is also the lowest. This is not to say that the other valuations are necessarily "unreasonable". This consideration applies even to the only valuation available to the CFI: this was also the only valuation made in Réunion where the vessel is situated. The acceptance of that valuation by the CFI should not be treated as unreasonable in the circumstances. However, I accept that the Applicant's last valuation raises the question of making a reduction in the amount of the bond, bearing in mind the way in which it was calculated.

I do not accept the reasoning in paragraph 88 on two grounds. First, the expert evidence mentioned in paragraph 54 was to the effect that toothfish could not be caught in the places where the master claims to have been fishing before entering the EEZ around the Kerguelen Islands. To my mind, this evidence means, therefore, that the fish could have been caught either in the EEZ or *at other places south of the Antarctic Convergence outside the EEZ*. (I would observe in passing that the vessel's logbook might contain relevant information concerning the crucial question of where the vessel was fishing in September and October this year. No adverse inferences should be drawn form its non-production to the Tribunal.) The second point on paragraph 88 concerns the assumption stated to have been made by the CFI and its consistency with the information before the Tribunal. The CFI appears to me to have been exercising a discretion, not finding facts. Moreover, I see no difficulty in the presumption. In the legislation of many States, there is a *statutory* presumption to the effect that, in the event of non-notification of the quantity of fish on board a fishing vessel when it enters the EEZ, all fish on board are presumed to have been caught there, until the contrary is shown to the satisfaction of the court. Such arrangements and rebuttable presumptions serve, in practice, to protect loaded fishing vessels in transit through an EEZ. Indeed, the legislation of the Seychelles contains just such provisions.[5] If a fisheries inspector boards a vessel in the middle of an EEZ, as in this case, and forms a "good reason to believe that the ship has violated the laws" of the coastal State (i.e. the test in article 111), the initial presumption must be that all the fish on board have been taken in that EEZ. The trial court can assess any defence evidence tending to show that some or all of the fish had been caught outside the EEZ.

For these reasons, I do not agree with the conclusion in paragraph 91.

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[4] It should not be overlooked in this connection that the Application has been brought *on behalf of* the Applicant by the legal representatives of the vessel and its Master.

[5] Section 15(2) of the Control of Fishing Vessels Decree 1979 reads:

> "A radio call made by a foreign fishing vessel before entering the exclusive economic zone indicating that the vessel is exercising its right of free navigation through the exclusive economic zone and notifying its proposed route and the quantity of fish on board shall suffice to rebut the presumption" provided for "in subsection (1)."

The legislation is cited by Burke, in *The New International Law of Fisheries* (1994), pp. 329-330.

Remedies: point 6

With regard to paragraph 93, I agree that in fixing the amount of a bond at a reasonable level, it is appropriate to have regard to the value of fish on board (and indeed the fishing gear) which, having been provisionally impounded, could be confiscated by order of the court upon the conviction of the accused. As I understand it, in the present case, the fish and the gear have already been secured under the applicable law, pending the outcome of the trial on 9 January 2001. This consideration could have been taken into account in fixing the amount of the additional security, without more on the part of the Tribunal. In my view, it is unnecessary for the Tribunal in circumstances such as the present to *determine* that something which has already been secured "shall be considered as security". Apart from the consideration that international courts should exercise restraint, in practical terms the value of the fish is unlikely to be *precisely* 9,000,000 FF when sold on the market. In my view, both paragraphs 94 and 95 are overly prescriptive.

The Form of the Bond: point 7

I have not opposed point 7 of the *dispostif*, whereas I did dissent from the equivalent paragraph in the "*Camouco*" *Case*. My reason there was that, having regard to the applicable law, the requirement that security be provided in the form of cash or a cheque was the normal practice in Réunion. As noted in paragraph 93 of the present Judgment, in implementing the decision in the "*Camouco*" *Case*, no difficulty appears to have arisen from the Tribunal's decision that a bank guarantee would be the appropriate form of security. (A leading French bank having provided the guarantee, the court appears to have accepted it and to have applied directly the terms of the Convention and the Tribunal's decision made under article 292.) A bank guarantee is easier for a vessel owner to arrange, bearing in mind that the sums involved are relatively large for the Master and probably also for the owners of the vessel. Bank guarantees are used in other jurisdictions and they serve to protect the positions of both sides. Accordingly, I accept that the appropriate form here would be a bank guarantee.

The Terms of the Guarantee: point 8

A bank guarantee is a legal document that takes effect according to a system of national law and speaks for itself. It may serve to cause confusion to decide, as in point 8, when the guarantee may or may not be invoked. Accordingly, I have voted against this point also.

(*Signed*) David H. Anderson

DISSENTING OPINION OF JUDGE LAING

1. I regret that I have been obliged to vote against the sixth operative provision of the Judgment. I have done so because of my position on the concept of a reasonable bond or other financial security and because, on my view of the facts and relevant law, the quantum of the aggregate security could have been under 9 million FF, not 18 million FF as in the operative provision. I assume (1) that, if the facts are later proven, the French territorial trial court will hold that there was non-notification of the vessel's presence in the exclusive economic zone and that there was illegal fishing therein and (2) that, under the relevant French law, the civil parties in the criminal proceedings, alleged victims claiming compensation, would prevail. At the suggested figure of not more than 9 million FF, the security should consist of the offloaded cargo of fish and there would be no need for a sizeable bank guarantee, if any.

2. I believe it will be helpful to state my assumptions concerning the apparent extent of illegal fishing that occurred and, very broadly, my predictions about how the trial court might handle it. Even though I cannot and would not claim to apply French law as an agent of that system, it is most definitely that source on which, primarily, my calculations are based. Given the precise fines that may be levied under the relevant French law, the judgment seems to be consistent with the view that there is adequate evidence of extensive illegal fishing or, possibly, that even minimal illegal fishing constitutes a grave offense (Judgment, paragraphs 44, 78–82 and 88). My own view is informed by my different understanding of the record and by the Tribunal's "arguable or sufficiently plausible" standard of appreciation, for determining whether an allegation by the flag State of non-compliance with article 73 of the Convention has been made out.[1] The hypothesis is that that standard also applies to proof of the basic or threshold contentions by the detaining State and that such proof has been made out in this case. Nevertheless, on the record before the Tribunal, my view is equally tenable if the detaining State's contentions are subject to a different standard of appreciation.

3. I must observe that, whatever the standard of appreciation, it is difficult not to view several aspects of the record before us with substantial caution, given the largely circumstantial nature of many of its contents. Several of these are contradictory. The Tribunal did not get to see such important pieces of evidence as the vessel's logbook or its equivalent, even though it was acknowledged that it does exist. An allegedly crucial videotape of the vessel made by the apprehending or arresting vessel was not made available to the Tribunal since, regrettably, it was still under seal pursuant to judicial order. The record is therefore consistent with the probability that only some three or four days of illegal fishing and a minimal catch could be assumed, according to the domestic norms relating to fishing in the exclusive economic zone of the French territories. In these cases, such norms must be sensibly viewed by this Tribunal, the chief guardian of the 1982 Convention, which specifies the international parameters. My conclusion is influenced by my view that, in this task, the Tribunal is required fully to bear in mind Part V of the 1982 Convention, applying its sound judgment in construing such qualifications to the

[1] As stated in paragraphs 50 and 51 of the Tribunal's Judgment in the *M/V "SAIGA" Case* (Prompt Release) this is:

> based on assessing whether the allegations made are arguable or are of a sufficiently plausible character in the sense that the Tribunal may rely upon them for present purposes [*separate, independent and accelerated prompt release proceedings*].

coastal State's capacity to take prescriptive and enforcement measures in the zone as the phrase "*as may be necessary* to ensure compliance with the laws and regulations adopted … *in conformity with this Convention*" (emphasis added) in paragraph 1 of article 73. In its task, I expect the Tribunal increasingly to draw inspiration from a wide variety of international legal sources.[2] I return to this subject in paragraph 6.

4. In some States, illegal fishing can be proved by presumptions. I believe that national laws and regulations are not in conformity with the Convention if proof of their violation is adduced through legal presumptions. Possibly for this reason, the Respondent's pleadings sought to disavow the apparent reliance on a presumption by the bond-setting judge. This question was debated at length in the pleadings but the text of the Judgment makes it clear that the touted presumption that the entire catch on board was illegally caught did not influence the Tribunal's decision. Therefore, the Tribunal should have been less generous about the size of the security it determined.

5. I have found that, strictly as a matter of evidence, there is no proof of a substantial violation of the proscription of illegal fishing. Let me firmly stress, however, that I decry illegal fishing and that I wholeheartedly encourage all efforts to extirpate that menace through diplomacy and the most far-reaching measures of international cooperation.

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6. As may be inferred from paragraph 3, in my view, what is reasonable security should be solidly grounded on pertinent international legal principles. All the principled concerns that are apposite to the Convention and to the institution of prompt release should be applied in a harmonious manner. For instance, the environmental or conservation concerns of the Convention in relation to the exclusive economic zone are of evident importance, as is mentioned in paragraph 78 of the Judgment, as long as they are of a legal nature and not just policy aspirations or underlying values. As important as these concerns undoubtedly are, reasonableness must also be grounded on the economic, humanitarian and other concerns of the Convention, as stated in its Preamble, as inherent in the very title of the exclusive "economic" zone, and as gleaned from the provisions governing the concept and institution of prompt release. In this connection, it is worth recalling that the exclusive economic zone is a new jurisdiction carved out of high seas. The crucial concerns and interests of the coastal State must be delicately balanced with other concerns and interests inherited from the pre-1982 high seas regime and now explicitly re-vested by the Convention in flag States, as well as coastal and other States. I reiterate my view that this Tribunal, not the national courts, is the chief guardian of all aspects of the Convention in prompt release cases. That role is of critical importance. In addition, the delicacy and complexity of these considerations highlight the fact that the prompt release competence under the Convention embraces much less than a handful of instances anticipated by article 292, read along with articles 73, 220 and 226.

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[2] One example is article XX of the General Agreement on Tariffs and Trade setting forth a number of general exceptions to the requirement of non-discrimination. Several of these are required to be "necessary," a concept which has often been judicially interpreted.

7. As the Judgment essentially states, and the preceding discussion demonstrates, reasonableness must be further grounded on the fact that prompt release is an independent and autonomous international institution and set of concepts. However, this is somewhat blurred *inter alia* by the quantum of the security ordered in this case, which may innocently appear to send contradictory signals. In proceedings like this one, the Tribunal must be very aware of the mindset of the national bond-setting judge, who is assumed to be striving to comprehend the essence of such dynamic and evolving international concepts and institutions as the exclusive economic zone, prompt release and even residual but crucial elements of the high seas regime. The Tribunal may well empathize with the national judge's broadly nationalistic preoccupations. However, as in all our prompt release cases to date, the Tribunal must continue to avoid the appearance of undergirding national goals and preoccupations, especially since both parties before it are sovereigns.

8. The Tribunal must protect those who are or whose property is detained. To some degree, the Tribunal's complex function is that of the helpmate of the authorities of the detained vessel or crew and, at the same time, the presumptive *alter ego*, but also the guide, of the national bond-setting judge. It seems relevant to note that national adjudicating bodies welcome this guidance. This is evidenced by the adoption of the elements of paragraphs 66 and 67 of the "*Camouco*" Judgment by a Court of First Instance at Réunion in setting the security under debate in this case. Another instance is the utilization by a Regional Trial Court (*tribunal de grande instance*) on Réunion island, in the final judgment against the *Camouco*'s Master, of only 3 million of the 8 million FF security that we prescribed in "*Camouco*", i.e., an amount much less than the 20 million FF that was originally ordered by the territorial bond-setting judge.

9. Furthermore, the Tribunal's articulation of the very multi-faceted concept of reasonableness should, as relevant, be patently and fully grounded in such synonymous notions as proportionality, balance, fairness, moderateness, consistency, suitability, tolerableness and absence of excessiveness. I hope that, in cases like this, the apparently large size of the security such as that demanded by the Réunion Court of First Instance will not stimulate, even accidentally, the inflation of the norms for assessing the size of the security set by the detaining State and also the norms for establishing the size of the security that this Tribunal determines and our quantitative norms for reasonableness. This would violate the notions of proportionality and consistency. Such problems of proportionality and consistency could occur regardless of which of the variety of possible mathematical approaches are applied for the above-mentioned purposes, including when the Tribunal comes to considering the factor for assessing the reasonableness of "the bond imposed by the detaining State" that is mentioned among the factors in paragraph 67 of the "*Camouco*" Judgment.

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10. Paragraph 67 of *"Camouco"* also identifies as relevant to the assessment of reasonableness the factor of "the value of the detained vessel". The size of the security that is required by the Tribunal in this case might suggest that the Tribunal is apparently taking into consideration and adding to a quantitative base the value of the detained vessel. This value is particularly relevant in situations where the vessel is being abandoned or condemned, where it is

being given as security and where it is confiscated. There might be other special situations. But even if the vessel's value is always routinely assessed, it is not appropriate automatically to add this value to that of the remainder of the security if imposable fines and penalties are already adequately covered by said remaining proposed security. On the other hand, it must be noted that the Tribunal has found that the vessel's value was the lowest of several figures determined by four experts – ranging from US$ 2 million to US$ 345,680. It is therefore patent that the lion's share of the security that the Tribunal determines is in respect of the alleged fishing, on which the Tribunal's explicit findings are equivocal.

11. The foregoing also suggests that the Tribunal cannot routinely adopt assertions that the vessel must or will certainly be confiscated as a penalty (another assessment factor mentioned in paragraph 67 of *"Camouco"*) and that therefore the proposed security should be enhanced by a value equivalent to that of the vessel. Certainly that would be impolitic, uneconomic and ultimately counter-productive, as owners of detained vessels begin to abandon their vessels. From the perspective of the global economy and of the economic concerns (including the rights and interests of vessel owners, their business partners and their customers), confiscation is obviously very troublesome. And even in legal systems with exorbitant tendencies, the penalty of confiscation is apparently not normal in cases lacking the circumstance of aggravation or not otherwise requiring exemplary treatment according to generally accepted legal principles. Frankly, viewed globally from the law of the sea perspective, unlike the somewhat dramatic situation in the *"Camouco"*, the offences here alleged and the facts on record involve conduct that is not aggravated, though it is quite unacceptable and unpardonable. Furthermore, in this case the detained person is a non-recidivist mariner accused of committing a first time violation in the detaining State's exclusive economic zone. Happily, the Judgment does not sanction confiscation. At the same time, I must state my concurrence that, on these facts, it is reasonable to assume that the national court will confiscate the vessel's gear that was seized.

(*Signed*) Edward A. Laing

DISSENTING OPINION OF JUDGE JESUS

1. The Tribunal, when dealing with prompt releases cases, should have a clear understanding of what it is called to act upon, within the meaning of relevant provisions of the Convention, namely of article 292, so as to imprint consistency to its decisions and avoid unwarranted interference in any consideration on the merits of the case.

2. In the "*Monte Confurco" Case*, the Tribunal seems to have acted otherwise. That is why I disagree with some fundamental aspects of the majority decision, especially in respect to the approach retained by that majority to determine the reasonable bond. Accordingly, I voted against operative paragraphs 6 and 8 of the Judgment.

3. Indeed, in the exercise of its sovereign rights for the purposes of exploring, exploiting, conserving and managing the natural resources in its exclusive economic zone, the coastal State, as recognized by article 73 of the Convention, has the right "to take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the Convention".

4. However, in order to avoid unnecessary prolonged periods of arrest or detention of vessels, the same article 73, paragraph 2, mandates that vessels and their crews be promptly released upon the posting of a reasonable bond.

5. These provisions of the Convention seem to strike a good balance between two different and opposing interests, protecting, on the one hand, the coastal State's sovereign rights over living resources from being plundered by illegal fishing and, on the other hand, avoiding unnecessary prolonged vessels arrest and detention that might, otherwise, cause heavy losses to the vessel's operator.

6. It is therefore important that the Tribunal should be able to preserve this balance whenever it is called, under the prompt release procedure, to determine what a reasonable bond should be in alleged fisheries violations.

7. I am afraid that the majority decision in the "*Monte Confurco" Case* failed to preserve such a balance.

8. This Tribunal has no role to play in any aspect or consideration upon the merits of the case. Indeed, article 292 of the Convention is quite clear in this regard when it states that "… [t]he … tribunal ... shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew".

9. One can understand the limitation imposed by the Convention on an international court or tribunal that, when dealing with a prompt release case, should only determine a reasonable bond and not delve into the merits of any case, a matter left, rightly so, to the domestic jurisdiction, in order to preserve the integrity of the coastal State's sovereign rights that otherwise might be disrupted.

10. The role of this Tribunal in prompt release cases of arrested or detained vessels for alleged violations of fisheries laws and regulations should thus be only one: to determine under the concrete circumstances of each case if the bond imposed by the domestic court is or is not reasonable. This is the only determination that the prompt release procedure requires from this Tribunal and nothing else. To go beyond this and to make qualifications of facts and law applicable to the case, as reflected in some paragraphs of the majority decision, is to encroach upon the exclusive jurisdiction of the domestic courts on the merits of the case.

11. Therefore, the core issue to be considered here is which criterion or approach to take in order to determine if a bond imposed by a domestic forum is or is not reasonable for the purposes of article 292 of the Convention, without having to make any consideration on the merits of the case.

12. In addressing this issue, the majority was unable to find a direction that would have preserved the limitation put on it by article 292 of the Convention not to deal with the merits of the case.

13. Accordingly, in order to establish a bond that it can consider as reasonable for the purposes of articles 73 and 292 of the Convention, the majority felt compelled to make some considerations on the merits of the case, evaluating facts and assessing evidence submitted in the course of the proceedings, drawing legal conclusions, actions that that, in my view, fall clearly within the purview of the domestic courts and not of this Tribunal.

14. The Tribunal, in so doing, embarked upon what I consider to be a constructive interpretation of its role in prompt release cases. Such position is totally unnecessary, finds no support in article 292 of the Convention and impinges upon the legitimate sovereign rights of the coastal States.

15. The majority could have avoided such unwarranted course of action and the temptation of making consideration on the merits of the case, had it adopted a common sense approach.

16. Indeed, since, under the Convention, the penalties involved in this case can only have an economic or monetary nature (see article 73, paragraph 3, of the Convention), it might make sense, it might be "reasonable", for the vessel's owner or the flag State to post a bond, the amount of which might be determined somewhere between the value of the vessel and the value of the totality of the assets seized by the coastal State.

17. A reasonable person, a prudent vessel operator, in general, might not post a bond, the amount of which is much higher than the value of the vessel (or its operational value) or, at most, the totality of the value of the assets seized by the detaining State.

18. There is no obligation on the vessel's owner to post a bond. He might do so if, in economic terms, it makes sense to him. Otherwise he might well wait for the decision of the domestic forum and risk only the value of its assets seized.

I would have thought that this should be the basis, the yardstick against which to measure the reasonableness of the bond.

19. In determining the reasonable bond one must not lose sight of its finality and therefore if the bond imposed by the domestic court is much higher than the value of the vessel (or its operational value) or, as the case may be, higher than the value of all the assets seized, it might then not be reasonable for the vessel's operator to activate the prompt release procedure, since he would run the risk, if condemned by the domestic court, of losing not only the cargo and other assets seized in the event of their confiscation, but also the bond posted.

20. On the other hand, seen from the side of the detaining coastal State, if no bond is to be posted on account of being excessively high, in the end the coastal State would, in any case, have to rely only on the value of the vessel and other assets seized, as the case may be, to respond for the fines (whatever their amount might be) and other penalties that might be imposed. It might be therefore not reasonable for the coastal State to impose a bond much higher than the value of the assets seized, maxime.

Accordingly, the maximum amount that can be posted as a reasonable bond is, at the same time, the maximum amount that the detaining coastal State can rely on, if no bond is posted.

21. The exact amount of the bond, ranging from the value of the vessel to the value of all the assets seized, would depend on the particular circumstances of the case, namely the value of the vessel, cargo and other assets seized, as well as the imposable fines and other penalties, under the detaining State legislation, having in mind the different weight to be given to each one of these relevant factors retained in paragraph 67 of the "*Camouco*" *Case*.

This is to me a better criterion to establish the reasonableness of the bond, one that is objective and does not disregard the command of article 292 of the Convention, imposing judicial restraint on this Tribunal when dealing with prompt release cases.

22. Therefore, I believe that, had this approach been the basis for the determination of the reasonableness of the bond, the balance embodied in articles 73 and 292 of the Convention between the coastal State rights to take action for the protection of its sovereign rights over living resources and the right of the flag State to seek relief from an unnecessary prolonged arrest or detention of a vessel, would have been preserved, without prejudice to the merits of any case before the French domestic courts, against the vessel, its owner or its crew.

23. Based upon this approach, though relying upon a different reasoning, I hold, like the majority, that the bond of 56,400 million FF, imposed by the order of the court of first instance at Saint-Paul to release the vessel *Monte Confurco* and its captain, pending the decision of the appropriate domestic court, is too high an amount and, therefore, it can not be considered a reasonable bond under the circumstances.

24. However, I do not agree with the majority decision, specifically in respect to the following fundamental points, in addition to what I have said in relation to the approach for fixing the reasonable bond:

25. Firstly, the majority decision, instead of treating "the laws of the detaining State and the decisions of its courts as relevant facts", without having to qualify them, in attempting to determine the reasonable bond, ends up preempting the domestic court from exercising its full competence on the merit of the case, by asserting the right for "examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond" (paragraph 74 of the Judgment).

26. Proceeding along this line, the Tribunal deals with considerations, clearly on the merits of the case, when it states that it "… is aware that the expert opinion of the scientist referred to in paragraph 54 suggests that not all the fish on board could have been fished outside the exclusive economic zone of the Kerguelen Islands".

It then draws the conclusion that it "does not, however, consider the assumption of the court of first instance at Saint-Paul as being entirely consistent with the information before this Tribunal".

It goes on, stating that "Such information does not give an adequate basis to assume that the entire catch on board, or a substantial part of it, was taken in the exclusive economic zone of the Kerguelen Islands; nor does it provide clear indications as to the period of time the vessel was in the exclusive economic zone before its interception" (paragraph 88 of the Judgment).

27. The preceding quotations from the majority decision clearly demonstrate that it acted beyond what is expected from the Tribunal in accordance with article 292 of the Convention.

28. It might well be the case that these findings might prove to be true, but that is a determination that can only be made by the domestic court. It is not the competence of this Tribunal to anticipate and therefore preclude the domestic court's positions on these very important aspects on the merits of the case. Besides, even if the Tribunal were to ascertain its competence to deal with such considerations, it did not have before it enough evidence to conclude in one way or the other.

29. Whether the vessel *Monte Confurco* fished or did not fish in the exclusive economic zone of the Kerguelen, or whether it caught the whole or only part of the amount of fish seized in the arrest by the French authorities, those facts are immaterial and irrelevant to the prompt release procedure before this Tribunal which should only be concerned with the determination of what a reasonable bond should be.

30. Such position taken by the majority is tantamount to making considerations on the merits of the case for which this Tribunal has no competence, as explained before, and raises the issue of overlapping jurisdiction with the domestic court.

31. Secondly, the majority decision held that "… the monetary equivalent of the 158 tons of fish on board the *Monte Confurco* held by the French authorities, i.e., 9,000,000 FF, shall be considered as a security to be held or, as the case may be, returned by France to the Applicant" (paragraph 93 of the Judgment).

32. In my view the majority decision was unwise to have taken the value of the fish seized as part of the bond, when the domestic legislation makes it subject to confiscation. One important aspect of legitimate penalties normally imposed by coastal States legislation (amongst them the French legislation), in such cases, is the confiscation of the product of illegal fishing.

33. It is conceptually wrong, in a case where the Tribunal has no competence on the merits, to consider as part of the bond or security any seized asset that, in the end, might be confiscated, by the decision of the appropriate domestic court, as part of the penalties imposable by the national legislation.

Indeed, it is beyond my understanding to grasp the rationale of such a decision of the majority in considering as part of the bond or security the very product of a claimed illegal activity.

34. In addition, by so doing, the majority decision clashes with the legitimate jurisdiction of the domestic court to exercise, here again, its full competence on the merits of the case.

Accordingly, I respectfully dissent.

(*Signed*) José-Luis Jesus